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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FRANK U. FLETCHER
ROBERT L. HEALD
MARVIN ROSENBERG

FLETCHER, HEALD & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 828-5700

Attorneys for Petitioner

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Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED

The decision of the Federal Communications Commission, affirmed by the court of appeals, presents the following question:

Whether the United States Court of Appeals for the Eighth Circuit was correct in concluding that a petition for rulemaking, wholly independent of any application for radio facilities, is nonetheless appealable only under Section 402(b) of the Communications Act of 1934, as amended, which concerns the appeal of adjudicatory radio "licensing" proceedings, and not under Section 402(a) of that Act.

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The decision of the United States Court of Appeals for the Eighth Circuit to dismiss the subject petition for lack of jurisdiction is incorrect as a matter of law, is contrary to the decisions of this Court, conflicts with the decisions of two other cirucit courts of appeals and has created confusion as to the applicability of the appeals provisions of the Communications Act 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Hubbard Broadcasting, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

PARTIES TO THE PROCEEDING

In addition to Hubbard Broadcasting, Inc., the Federal Communications Commission and the United States of America, American Broadcasting Companies, Inc. and Jackson and Chaisson Broadcasting Systems, Inc. were

parties to the proceedings before the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit for which petitioner seeks a writ of certiorari is officially reported in *Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594 (8th Cir. 1982), and is set forth herein as Appendix A. The decision dismissed an appeal from a decision of the Federal Communications Commission. *Hubbard Broadcasting, Inc.*, 87 F.C.C.2d 988 (1981). Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 6, 1982. Jurisdiction in this Court is invoked by 28 U.S.C. § 1254 (1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves conflicting interpretations of Section 402 of the Communications Act of 1934, as amended, regarding judicial review of decisions of the Federal Communications Commission. 47 U.S.C. § 402 (1976). This statute is reproduced as Appendix D.

STATEMENT OF THE CASE

Petitioner Hubbard Broadcasting, Inc. is the licensee of of standard broadcast station KOB, Albuquerque, New Mexico, operating on AM frequency 770 kHz. KOB's operation at night is restricted by the operation of that of "clear channel" station WABC, which also operates

on 770 kHz at New York City and is licensed to American Broadcasting Companies, Inc., intervenor in the case below.

While the gravamen of this case is jurisdictional, the question of jurisdiction can only be understood in light of the procedures employed by respondent Federal Communications Commission to fix the locations, frequencies and transmitting powers of broadcast stations. Accordingly, a brief explication of the Commission's allocation processes is necessary.

This case involves the allocation of the unique, high-power, omnidirectional, so-called "clear channel" AM radio stations.[1] By virtue of their power, the protection from interference which the Commission accords them and the so-called "skywave phenomenon,"[2] these unique Class I-A, clear-channel stations are capable of providing radio service up to approximately 750 miles from their transmitters, a potential for coverage greater than any other kind of radio or television broadcast station. *See, e.g., Clear Channel Broadcasting in the AM Broadcast Band,* 78 F.C.C.2d 1345, 1366 (1980). As the United States Court of Appeals for the District of Columbia Circuit has explained, "primary" signals travel "closely along the earth's surface" with their intensity diminishing with distance but remaining "relatively constant at any location day and night from season to season." *WAIT Radio v. FCC,* 459 F.2d 1203, 1205 (D.C. Cir. 1972),

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[1] Of the more than 4,500 AM radio stations in the United States, only 25 have been selected by the FCC to be omnidirectional, clear channel stations. These are denominated by the Commission as Class I-A stations. *See* 47 C.F.R. § 73.22 (1981).

[2] Unlike FM or television stations, AM radio stations are capable of transmitting not only "groundwave" or "primary" signals but also "skywave" or "secondary" signals.

cert. denied, 409 U.S. 1027 (1972). On the other hand, "secondary" signals are caused by the so-called "skywave phenomenon," which "refers to that portion of the energy which travels upward from the transmitter into the upper atmosphere." *Id.* During the day, "because of the sun, this skywave is absorbed by the atmosphere. At night it is reflected, off layers of the upper atmosphere, back to earth, at distances much greater than the reach of the groundwave signal." *Id.* Thus, while skywave signals are less reliable, the signals are capable of providing service over large distances "when free from excessive interference on the same or adjacent channels." *Id.* (footnote omitted).

Both the FCC and its predecessor have taken advantage of this unique ability in order to provide radio service over wide, sparsely populated areas. These few stations became known early in the history of broadcasting as clear channel stations, licensed by the Commission specifically to provide that

> standard broadcast service to rural areas since channels which are primarily allocated for service to population centers (the so-called regional and local channels) must be shared by a multiplicity of stations and are, therefore, cluttered with interference—particularly at night when propagation conditions make interference problems more acute—to such an extent that each station provides satisfactory service only over relatively short distances where its signals are strong enough to override interference. Rural areas beyond these distances thus receive no service from such stations and must rely on the 10-to-50 kilowatt clear channel stations.

Federal Communications Commission, *Seventeenth Annual Report* 117 (1952).

Traditionally, AM stations have been assigned to various communities through adjudicatory proceedings in which an applicant would file an application to use a particular frequency at a particular power in a particular community. *See Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 25-26 (D.C. Cir. 1954). However, the Commission has determined to assign stations on thirteen of the clear channel frequencies by specific rule, and has, in fact, promulgated a table of assignments, similar to those employed for FM radio and television, *see id.*, for the location of clear channel frequencies. 47 C.F.R. § 73.22 (1981).[3] Among those frequencies located by rule is 770 kHz, which specifies the location of a Class I-A operation in New York City and the location of a Class II-A use in New Mexico. *Id.*

In specific recognition of the Commission position that Section 73.22(a) of its rules represented a table of assignments[4] which could be changed only by amendment or waiver, Hubbard filed the instant petition for rulemaking on March 9, 1981.[5] Appendix C. Hubbard also filed an application for Class I-A operation of the frequency 770 kHz at Albuquerque, New Mexico. A

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[3] *See, e.g.*, Hubbard Broadcasting, Inc., 44 Rad. Reg. 2d (P&F) 1005 (1978), *reconsideration denied*, 71 F.C.C.2d 591 (1979), *aff'd sub nom.*, Hubbard Broadcasting, Inc. v. FCC, Case No. 79-1549 (D.C. Cir., decided December 29, 1980).

[4] Hubbard Broadcasting, Inc., 44 Rad. Reg. 2d (P&F) at 1006.

[5] The rule amendment requested was that the frequency 770 kHz be allocated for Class I-A operation at Albuquerque instead of New York City. However, the frequency would still be available to New York City for other than Class I-A operation. Indeed, Hubbard's proposal suggested that a Class II-A station on 770 kHz be substituted in New York for the present Class I-A station. App. 19a.

request for waiver of Section 73.22(a) was included as part of that application. On June 9, 1981, the Chief of the Commission's Broadcast Bureau, acting under delegated authority, refused to institute a rulemaking proceeding and dismissed Hubbard's petition. App. 12a. Hubbard filed an application for review and on September 30, 1981, the Commission affirmed the Bureau Chief's ruling. App. 7a.

A timely petition for review was filed in the United States Court of Appeals for the Eighth Circuit. The Commission filed an untimely motion to dismiss for lack of jurisdiction, which the court dismissed without prejudice. The motion to dismiss was renewed in the brief for Respondents.[6] On August 6, 1982, the court, after full briefing and oral argument, dismissed the appeal for lack of jurisdiction. The court found that the "FCC's denial of Hubbard's 'package' of applications [*sic*] was, as a matter of substance, the exercise by FCC of its 'radio-licensing power' reviewable under Section 402(b)." App. 5a.

This petition for certiorari followed.

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[6] Notably, respondent United States of America did not join in the Commission's jurisdictional argument. *See* Brief for Respondents at 18, n.17.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO DISMISS THE SUBJECT PETITION FOR LACK OF JURISDICTION IS INCORRECT AS A MATTER OF LAW, IS CONTRARY TO THE DECISIONS OF THIS COURT, CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUIT COURTS OF APPEALS AND HAS CREATED CONFUSION AS TO THE APPLICABILITY OF THE APPEALS PROVISIONS OF THE COMMUNICATIONS ACT.

Hubbard urges that the Eighth Circuit's interpretation of the appeal provision of the Communications Act is in conflict with the decisions of this Court and those of other circuits and is incorrect on its face. Moreover, the interpretation has interjected considerable confusion regarding the jurisdiction of the various courts of appeals concerning review of decisions of the Commission and raised doubts regarding the rights of those adversely affected by Commission action to seek review in their home circuits. Accordingly, Hubbard urges that this Court grant the instant petition for a writ of certiorari and review the subject decision of the United States Court of Appeals for the Eighth Circuit.

The Communications Act provides for two separate avenues for review of Commission decisions. First, Section 402(b) lists eight specific categories of appeal which must be taken to the United States Court of Appeals for the District of Columbia. 47 U.S.C. § 402(b) (1976). The second, and mutually exclusive avenue of review of Commission actions is contained in Section 402(a) of the Act which, in contra distinction to the specific listing of appealable orders under Section 402(b), concerns "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act

(except those appealable under subsection (b) of this section)." 47 U.S.C. § 402(a) (1976). In essence, Section 402(a) grants the federal courts of appeals jurisdiction over actions reviewable under 28 U.S.C. § 2342 (1976), with venue "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit," 28 U.S.C. § 2343 (1976).

In the instant case, Hubbard sought review not of the dismissal of its application but only of the denial of its petition for rulemaking to amend the rule by assigning the frequency 770 kHz to Albuquerque for Class I-A use. However, in the Eighth Circuit's view, even though the appeal case involved only a petition for rulemaking and not an application, the case was reviewable only under Section 402(b) since "the FCC's denial of Hubbard's 'package' of applications [*sic*] was, as a matter of substance, the exercise by FCC of its 'radio-licensing power' reviewable under Section 402(b)." App. 5a.

Initially, it is submitted that the Eighth Circuit's characterization of the actions by Hubbard is simply incorrect. Hubbard did not submit a "package" of applications to the Commission. To the contrary, it is manifest that Hubbard submitted a single application (which included a request for waiver of Section 73.22) and a single petition for rulemaking. While the application with the request for waiver would have allowed Hubbard's Station KOB to construct Class I-A facilities and would have effectively allocated 770 kHz to Albuquerque for Class I-A use, Hubbard's petition for rulemaking would have merely allocated 770 kHz to Albuquerque for Class I-A use. Accordingly, while the application and petition might have been functionally equivalent in the sense that both would have worked to

assign the frequency 770 kHz to Albuquerque for Class I-A use, the petition and the application were designed to produce different results. A grant of the application and the waiver would have allowed Hubbard to operate Station KOB as a Class I-A station. In contrast, the grant of Hubbard's petition for rulemaking and the amendment of the rule as proposed therein, would not, by itself, have modified or affected the license of any specific station, including Station KOB. To obtain a Class I-A authorization, Hubbard would still have had to file and receive a grant of an application.

The lower court failed to recognize that the petition and the application were wholly independent of each other. As Hubbard explained, it filed both an application and a petition in order to allow the Commission to allocate 770 kHz to Albuquerque either through adjudication or through rulemaking. The Commission declined to allocate the frequency through either process. However, Hubbard did not appeal the denial of its waiver request and the dismissal of its application but sought review only of the order denying its petition for rulemaking.

Since the petition for rulemaking would not have affected the license of any station, the Commission's action in denying the petition simply cannot be contorted into a licensing decision. Indeed, neither the Commission nor the Eighth Circuit has been able to fit the denial of Hubbard's petition for rulemaking within any of the categories specified in Section 402(b). Accordingly, the denial of the petition is reviewable only under the residuary provisions of Section 402(a).

The principle relied upon by the Eighth Circuit is contrary to the decision of this Court in *FCC v. Columbia Broadcasting System*, 311 U.S. 132 (1940). In that

case the Court strictly construed the language of Section 402(b) and held that a Commission order refusing to consent to an assignment of a radio station license was not one of the types specifically listed in 402(b). This Court reaffirmed its strict construction of the language of Section 402(b) in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942). In that case, the order of the Commission adopting the chain network rules was held reviewable under Section 402(a), the Court stating:

> Since the Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission . . . has done which is decisive.

Id. at 416.

In direct contradiction to these rulings, the Eighth Circuit has promulgated a principle that if a Commission order "bears a 'close functional similarity' to the types of cases enumerated under that section, or is 'ancillary' to, or 'in aid of,' or 'intimately associated with' the FCC licensing authority," it is reviewable only under Section 402(b). App. 4a (footnotes omitted). This practice of loosely relating almost every Commission order to that agency's licensing function cannot be harmonized with this Court's decisions. In addition, the practice is in direct conflict with the intent of Congress when it expanded the categories covered by Section 402(b) in order to attempt a more precise and comprehensive definition of the jurisdiction of the United States Court

of Appeals for the District of Columbia Circuit. S. REP. No. 44, 82nd Cong., 1st Sess. 11 (1951). The result has been that the "confusion and controversy"[7] existing before the adoption of the 1952 amendments to the Communications Act of 1934 has not been eliminated, as Congress hoped, but has continued and expanded.

In addition, the Eighth Circuit's decision is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981). There, the Seventh Circuit accepted jurisdiction over a case involving the denial by the Commission of an application for a radio operator license. In denying the Commission's argument that the denial of the application was appealable only under Section 402(b), the court stated:

> The first seven categories listed in Section 402(b) cover orders relating to the granting, denial, modification and revocation of construction permits and station licenses. The last category covers orders suspending operator licenses. The petition here is for review of orders denying applications for operator licenses. Thus, as the Commission concedes, the order in issue "is not precisely described by any of the categories of appeals provided for in Section 402(b)". . . . The Commision argues that the order is nevertheless within the ambit of Section 402(b) because it is a licensing decision functionally similar to those specifically listed. However, it is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories. . . . Plainly, had Congress intended that all licensing decisions be reviewable pursuant to Section 402(b), there would have been no point in listing the eight specific categories provided for in that Section.

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[7] S. REP. NO. 44, 82d Cong., 1st Sess. 11 (1951).

650 F.2d at 892-893. Since a petition for rulemaking is not one of the categories enumerated in Section 402(b), the Seventh Circuit's reasoning would require that its denial be reviewable only under the provisions of Section 402(a). Thus, the principles of law adopted by the two circuits are in direct conflict.

The Commission's decision is likewise directly inconsistent with that of the United States Court of Appeals for the Third Circuit in *New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119 (3d Cir. 1978). There a citizens group filed a petition for rulemaking seeking to amend the Commission's table of television allocations to assign a new VHF television channel to a city in New Jersey or to reassign a New York City or Philadelphia channel to a city in New Jersey.[8] Thus, as in the instant case, the Commission refused a rulemaking request that a frequency be reassigned from one city to another. Yet, without question, the Third Circuit found that it had jurisdiction over the appeal pursuant to Section 402(a).

As in 1940, a question of importance has been raised touching on the distribution of judicial authority under Section 402 of the Communications Act of 1934, as amended.[9] Confusion as to which court would have jurisdiction in a particular case is widespread among

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[8] The Eighth Circuit is incorrect in asserting that the Commission in *New Jersey Coalition* merely "terminated an inquiry into the adequacy of television service in the State of New Jersey." It is clear that the Commission also rejected a request for assignment of frequencies from either New York City or Philadelphia. New Jersey Coalition for Fair Broadcasting v. Federal Communications Commission, 574 F.2d 1119, 1122 (3d Cir. 1978).

[9] *See* FCC v. Columbia Broadcasting System, 311 U.S. 132, 133 (1940).

different agencies of the government, the courts of appeals, and litigants themselves. The result is that in many cases the appealing party must go to the District of Columbia Circuit and seek review under both Sections 402(a) and 402(b) in order to avoid the risk of dismissal.[10] As a consequence, the District of Columbia Circuit is overburdened with administrative appeals and many citizens are deprived of their right to litigate cases involving important communications matters in the jurisdiction of their choice.

In 1952, Congress sought to eliminate the confusion in this very important judicial matter, but clearly it failed. The above-cited conflict among the various circuit courts has aggravated this problem just as has the disagreement between the Department of Justice and the Federal Communications Commission in the instant case. The Commission, itself, has been unable to agree with the circuit courts in various cases.[11] Clearly, this is an important matter affecting a substantial number of American citizens, which should be resolved by the Court.

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[10] *See, e.g.*, Columbia Broadcasting System v. FCC, 211 F.2d 644 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 876 (1954); Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963); Metropolitan Television Company v. United States, 221 F.2d 879 (D.C. Cir. 1955).

[11] *See, e.g.*, Campos v. FCC, 650 F.2d 890 (7th Cir. 1981), where Commission's contention that appeal was properly under 402(a) was overruled; Tomah-Mauston Broadcasting Co. v. FCC, 306 F.2d 811 (D.C. Cir. 1962), where Commission's argument that appeal was under 402(a) was denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HUBBARD BROADCASTING, INC.

FRANK U. FLETCHER

ROBERT L. HEALD

MARVIN ROSENBERG

Attorneys for Petitioner

FLETCHER, HEALD & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 828-5700

November, 1982